(1)
Supreme Court, U.S.
FILED
95 1131 JAN 11 1996
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ERNEST JONES, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

LEONARD R. STAMM*
GOLDSTEIN & STAMM, P.A.
Capital Office Park
6301 Ivy Lane, Suite 504
Greenbelt, MD 20770
(301) 345-0122

Counsel for Petitioner
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

87 pp

QUESTION PRESENTED

WHETHER MARYLAND'S PRE-TRIAL ADMINISTRATIVE PER SE DRIVER'S LICENSE SUSPENSION IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES?

LIST OF INTERESTED PARTIES

The caption contains the names of all the parties below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTERESTED PARTIES	ii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
MARYLAND'S PRE-TRIAL ADMINISTRATIVE PER SE DRIVER'S LICENSE SUSPENSION IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES	8
I. THIS CASE IS WORTHY OF REVIEW BECAUSE *JONES* IS IN DIRECT CONFLICT WITH *HALPER, AUSTIN,* AND *KURTH RANCH*	8
II. THIS CASE IS WORTHY OF REVIEW BECAUSE THE LOWER COURTS ARE IN COMPLETE CONFUSION AS TO HOW TO APPLY *HALPER, AUSTIN,* AND *KURTH RANCH* TO A PRETRIAL DRIVER'S LICENSE SUSPENSION FOR DRUNK DRIVING	23
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) ..... *passim*

Bell v. Burson, 402 U.S. 535 (1971) 12

Bell v. Wolfish, 441 U.S. 520 (1979) 18

Brosan v. Cochran, 307 Md. 662, 516 A.2d 970 (1986) 12

Davidson v. Mackinnon, 656 So.2d 223 (Fla. App. 1995) 24, 25

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) ..... *passim*

Dixon v. Love, 431 U.S. 105 (1977) 12

Ellis v. Pierce, 282 Cal.Rptr. 93 (Cal.App.1991) 25

Freeman v. State, 611 So.2d 1260 (Fla.App.1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 415 (1993) 25

Johnson v. State, 95 Md.App. 561, 622 A.2d 199 (1993) 21, 25

Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990) 8, 19

Motor Vehicle Admin. v. Shrader, 324 Md. 454, 597 A.2d 939 (1991) 17

Murphy v. Commonwealth, 896 F.Supp. 577 (D.Va. 1995) 24, 26

Riddick v. State, 319 Md. 180, 571 A.2d 1239 (1990) 22

Sites v. State, 300 Md. 702, 481 A.2d 192 (1984) 12

TABLE OF AUTHORITIES – Continued

Page

Snow v. Superior Court, No. 1CA-SA 95-0102, 1995 WL 332263 (Ariz.App. Jun. 6, 1995) 24

State v. Ackrouche, 650 N.E.2d 535 (Ohio Mun. 1995) 24, 26

State v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ohio App. June 27, 1995) 23

State v. Hanson, 532 N.W.2d 598 (Minn.App. 1995) 20

State v. Higa, 897 P.2d 928 (Haw. 1995) 24, 25

State v. Jones, 340 Md. 235, 666 A.2d 128 (1995) ..... *passim*

State v. Roll, 267 Md. 714, 298 A.2d 867 (1973) 19

State v. Savard, 659 A.2d 1265 (Me. 1995) 24, 25

State v. Toyomura, 904 P.2d 893 (Haw. 1995) 25

State v. Young, 530 N.W.2d 269 (Neb.App. 1995) .. 24, 25

Tench v. Commonwealth, 462 S.E.2d 922 (Va.App. 1995) 24

United States v. $405,089.23 in United States Currency, 33 F.3d 1210 (9th Cir. 1994), *amended on denial of reh'g en banc*, 56 F.3d 41 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346) 25

United States v. Halper, 490 U.S. 435 (1989) ..... *passim*

United States v. Perez, No. 94-60788, 1995 WL 689385 (5th Cir., Nov. 21, 1995) 25

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345) 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V..... *passim*

United States Constitution, Amendment XIV 12

STATUTES

23 U.S.C. § 408.....14, 23

23 U.S.C. § 410.....14, 23

28 U.S.C. § 1257(a) 1

Md. Code Ann., Article 27, § 641 5

Md. Code Ann., Cts. & Jud. Proc. Art., § 11-103.2 2

Md. Code Ann., Transp. Art., § 16-113 9

Md. Code Ann., Transp. Art., § 16-205.1 ..... *passim*

Md. Code Ann., Transp. Art., § 16-205 ..... 4, 9, 11

Md. Code Ann., Transp. Art., § 16-206 .....4, 9

Md. Code Ann., Transp. Art., § 16-208(b) 11

Md. Code Ann., Transp. Art., § 16-404 ..... 4, 9, 11

Md. Code Ann., Transp. Art., § 16-405 9

Md. Code Ann., Transp. Art., § 21-902 .....2, 4

RULES

Maryland Rule 1230, Rules of Professional Conduct, Rule 8.4 16

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Brief of Amicus Curiae, Insurance Institute for Highway Safety (IIHS).....10, 18

Brief of Petitioner, State of Maryland 10

Congressional Record..... 14

Drunk Driving Defense Okayed By U.S. Court, Lawyer's Weekly USA, September 25, 1995..... 23

General Assembly of Maryland, Report of the Task Force on Drunk and Drugged Driving, 1988 Interim 13, 14

Will Drunk Driving Defense Be Rejected? Experts say Wait for Federal Courts, Lawyer's Weekly USA, Dec. 4, 1995..... 24

OPINION BELOW

The reported opinion of the Court of Appeals of Maryland, *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), reversing the order of dismissal of the Circuit Court for Montgomery County, Maryland, is reproduced in Appendix A (1a-35a).

STATEMENT OF JURISDICTION

The Petitioner requests that this Court grant the petition for writ of certiorari and reverse the judgment of the Court of Appeals of Maryland in *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995). The Court of Appeals decision applies the Double Jeopardy Clause of the Fifth Amendment, as applied to the states under the Fourteenth Amendment, contrarily to three decisions of this Court: *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). The Court has jurisdiction to consider the Double Jeopardy Clause issue pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment V, provides in relevant part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The pertinent provisions of Maryland Code Ann., Transportation Article, § 16-205.1 (1992 Repl. Vol., 1994 Cum. Supp.), are set forth in Appendix D.

STATEMENT OF THE CASE

Factual background

The Petitioner, Ernest Jones, Jr., was arrested and charged criminally with driving while intoxicated and under the influence of alcohol, in violation of Maryland Code Ann., Transp. Art., § 21-902, on April 25, 1994. During processing by police, he had submitted to a test to determine alcohol concentration with a result of .27.[1] Pursuant to Maryland Code Ann., Transp. Art., § 16-205.1., Maryland's administrative per se driver's license suspension statute, the arresting officer seized Jones' driver's license, and issued a temporary license pending Jones requesting a hearing to contest a proposed 45-day suspension of his driver's license.

Maryland Law

Since January 1, 1990, § 16-205.1 has required that offenders who provide a test result of more than .10 shall have their drivers' licenses suspended for 45 days for a first offense, and 90 days for any subsequent offense. The penalty for a refusal is 120 days for a first offense and one

---

[1] Under Maryland Code Ann., Cts. & Jud. Proc. Art., § 11-103.2 (1995 Repl. Vol.), "alcohol concentration" is defined as "the number of grams of alcohol per 100 milliliters of blood" or "the number of grams of alcohol per 210 liters of breath."

year for a subsequent offense. § 16-205.1(b). Only offenders who submit to the test and who have not been suspended for or convicted of drunk driving within the previous five years are eligible for a modification of the suspension or issuance of a permit restricted for purposes of employment or alcohol education. § 16-205.1(n).

Upon determining that reasonable grounds exist to believe a driver is under the influence of alcohol or intoxicated, the police officer is required to detain the driver, advise the driver of the penalties that shall be imposed, and offer the driver the test to determine alcohol concentration. § 16-205.1(b)(2). Where the driver refuses, or submits and the result is greater than .10, the officer is required to confiscate the driver's license, issue an order of suspension and a 45-day, temporary license, and send a sworn certificate to the Motor Vehicle Administration within 72 hours indicating compliance with the statute and containing the reasonable grounds to believe the driver was driving while intoxicated or under the influence of alcohol. § 16-205.1(b)(3).

Unless the driver requests a hearing within 30 days, the applicable suspension is automatically imposed. § 16-205.1(f)(4). At a hearing, an administrative law judge (ALJ) determines whether the officer had reasonable grounds to believe the person was driving while intoxicated or under the influence of alcohol, whether the advice of rights and consent to a test was given, and whether the driver submitted to a test with a result of more than .10 or refused the test. § 16-205.1(f)(7), (8). If the required findings are made, the ALJ issues the appropriate sanction.

In a separate court proceeding, the State prosecutes offenders under Maryland Code Ann., Transp. Art., § 21-902, which prohibits drunk driving. If convicted, the defendant may be jailed and or placed on probation. Additionally, points may be assessed and a conviction noted on the drivers record which leads to yet further license suspension or revocation proceedings before the Motor Vehicle Administration under Transp. Art., §§ 16-205, 206 and 404.

Proceedings before the Maryland Office of Administrative Adjudication

On August 31, 1994, in an administrative proceeding, Jones' driver's license was suspended for 30 days, as a result of a breath test in excess of .10. An ALJ found that there were reasonable grounds to believe Jones was driving while intoxicated or under the influence of alcohol, that he had been advised of the administrative penalties that would be imposed for submitting or refusing to submit to an alcohol test, that he had agreed to take the test, and that the test result was more than .10. The ALJ also found that Jones was eligible for a modification of the mandated 45-day license suspension for a first offense of a test result of .10 or over because he needed to drive for purposes of alcohol education and employment and because he had not had a prior suspension under Maryland Code Ann., Transp. Art., § 16-205.1 or a conviction under Transp. Art., § 21-902 within the past five years.

After considering that the petitioner had two prior probations before judgment[2] for drunken driving, the ALJ denied a permit restricted for work and alcohol education purposes and imposed a 30-day suspension.

Proceedings before the District Court for Montgomery County, Maryland

On November 15, 1994, Jones was convicted of driving while intoxicated in the District Court for Montgomery County, Maryland. He was sentenced to serve one year in the Montgomery County Detention Center, with all suspended but three days, fined $800, all of which was suspended, placed on two years supervised probation, and required to obtain a restriction on his driver's license prohibiting him from driving after consuming any alcohol.

Proceedings before the Circuit Court for Montgomery County, Maryland

On *de novo* review from the conviction for driving while intoxicated in the District Court, on March 22, 1995, the Circuit Court for Montgomery County, Maryland granted the Petitioner's motion to dismiss on the ground that further prosecution would violate the multiple punishment prohibition of the Fifth Amendment Double Jeopardy Clause and the common law of Maryland.

---

[2] Probation before judgment, pursuant to Maryland Code Ann., Article 27, § 641, is a disposition after a finding of guilt, suspending the verdict.

Proceedings before the Maryland Court of Appeals

The Maryland Court of Appeals granted the State's petition for a writ of certiorari, and reversed. In *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), the Maryland Court of Appeals held that the administrative license suspension of an individual charged with drunk driving, did not constitute "punishment" so as to preclude prosecution of the drunk driving charge on double jeopardy grounds. The court determined that the suspension was rationally related to remedial purposes served by Transportation Article, § 16-205.1, even though the statute was also intended to punish and deter drunk drivers.

The *Jones* court rejected the State's assertion that the statute served solely remedial purposes as well as Jones' argument that the statute was solely punitive under *Halper*, *Austin*, and *Kurth Ranch*. Rather, the court, upon review of the historical purposes generally served by license suspensions, and the legislative history and language and structure of Maryland's administrative per se law, concluded that the law served both remedial and punitive objectives. The court rejected Jones' assertions that the severity of the suspensions imposed under the law, between 45 days and one year, the focus only on individuals arrested and charged with drunk driving, and the failure to relate the term or imposition of suspensions to a finding of unfitness of the driver required a conclusion that the suspension of Jones' license was punishment. The court also rejected the State's argument that language in prior Court of Appeals cases finding a legislative intent to protect the public required characterizing the suspension as remedial. The court agreed with Jones, to the extent the legislative history required recognizing

that the intent of the law, at least in part, was to punish and deter drunk drivers.

However, the Court of Appeals rejected Jones' argument that *Halper*, *Austin*, and *Kurth Ranch*, required the State to prove that the license suspension statute served solely remedial purposes. An amicus brief was filed by the Insurance Institute for Highway Safety (IIHS) to present statistical information relevant to the State's alleged remedial interests because, "[t]he record below is devoid of any shred of evidence on the state's interest in the remedy it seeks or the effect of that remedy." Motion for Reconsideration of Order Limiting Scope of Amicus Brief, 12. However, the State, IIHS, and another amicus curiae brief filed by Advocates for Highway and Auto Safety, all failed to proffer *any* evidence of the rate of recidivism between arrest and trial in drunk driving cases to support a remedial license suspension between arrest and trial. The court nonetheless rejected Jones' suggestion of an inverse relationship between drunken driving arrests and recidivism between arrest and trial and his argument of a lack of a rational relationship between the suspensions and any remedial objective. Instead the court stated, "[i]f the class of individuals who fail or refuse to take breath or blood tests have an increased probability of driving while intoxicated, § 16-205.1 can fairly be said to serve the remedial purpose of maintaining safety on the public highways." *Jones*, 340 Md. at 256, 666 A.2d at 138. Given the nature of the State's purpose allegedly served, maintaining safety on the highways, the court rebuffed Jones' claim that *Halper*'s two-part test involved factual issues which required affirmance of the circuit court, and Jones' claim that the State had failed to meet its burden of proof.

Jones requests the Petition for a Writ of Certiorari be granted in this case, because as is more fully set forth below, *Jones* conflicts with *Halper, Austin,* and *Kurth Ranch.* Additionally, the state appellate courts have used conflicting analyses in license suspension cases, indicating widespread disagreement by state courts over the proper interpretation and application of *Halper, Austin,* and *Kurth Ranch,* and requiring guidance from this Court.

REASONS FOR GRANTING THE WRIT

MARYLAND'S PRE-TRIAL ADMINISTRATIVE PER SE DRIVER'S LICENSE SUSPENSION IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES.

I. THIS CASE IS WORTHY OF REVIEW BECAUSE *JONES* IS IN DIRECT CONFLICT WITH *HALPER, AUSTIN,* AND *KURTH RANCH.*

The judgment of the Court of Appeals that the license suspension in this case was not "punishment" for purposes of double jeopardy analysis was incorrect because the driver's license suspension statute here, unlike other arguably remedial license suspension statutes, is uniquely and specifically designed to bypass the court system, and punish and deter first offender drunk drivers who prior to the adoption of administrative per se legislation in 1989 had escaped meaningful punishment, but who in the Maryland Court of Appeal's prior considered judgment are not categorically unfit or unsafe to drive. *See, Motor Vehicle Admin. v. Mohler,* 318 Md. 219, 567 A.2d 929 (1990). Other pre and post judicial license suspension provisions arguably aimed at protecting the public from

drivers with a propensity to violate the law have been and remain in force. *E.g.*, Md. Code Ann., Transp. Art., §§ 16-113, 16-205, 16-206, 16-404-05. The legislative history of the Maryland statute reveals an overwhelming intention to use license suspension as a punishment for and deterrent to drunk driving before this Court decided *United States v. Halper*, 490 U.S. 435 (1989). *Jones'* application of *Halper*, to conclude that the administrative per se suspensions fairly serve solely remedial purposes, despite the court's recognition that the suspensions do serve punitive purposes, conflicts with *Halper*, *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

This Court has held that the penalty imposed in a proceeding that is considered to be "civil" in nature may nonetheless be limited by the prohibition of the Double Jeopardy Clause against multiple punishments to the extent the civil sanction is considered to be "punishment" where the civil proceeding is separate from a criminal conviction and sentence for the same offense. *Halper*. The *Halper* holding was clarified in *Austin*, where this Court reiterated that " '[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 113 S.Ct. at 2812, *quoting*, *Halper*, 409 U.S. at 448 (emphasis in *Austin*). If the defendant makes this showing, then the burden shifts to the State to prove its actual losses. *Halper*, 409 U.S. at 449-50.

In a more recent decision, *Kurth Ranch*, this Court held that where the subsequent civil penalty "taken as a

whole" serves the purpose of "punishment" and is not susceptible of division into its remedial and punitive aspects, that the Double Jeopardy Clause may bar the entire proceeding where the penalty is severe, it serves the purposes of retribution and deterrence, it is only assessed against persons arrested for a criminal offense, and it bears little relation to remedial purposes. 114 S.Ct. at 1948. Under either the *Kurth Ranch* or the *Halper-Austin* analysis, the 30 day driver's license suspension imposed by an ALJ in this case, after finding that Jones needed his license for employment and to attend his alcohol programs, constituted a punishment which required the dismissal of the drunken driving citation.

The State's contention on appeal below was that the trial court misapplied *Halper* by failing to require Jones to show that the *sole* purpose of the driver's license suspension is punishment. Brief of Petitioner, State of Maryland (Md.) at 13. The State argued, without any evidence in the record, and contrary to numerous court statements and the legislative history, that the *sole* purpose of the license suspension is remedial. Md. at 13-14. Even amicus curiae, IIHS, disagreed, arguing instead that the statute's general deterrent effect produces a decrease in alcohol related accidents. IIHS Brief at 29. Because the State's very narrow claim of error did not comport with this Court's cases and the facts, the circuit court should have been affirmed.

A. Kurth Ranch

The administrative per se suspension possesses many of the characteristics that marked the marijuana tax in

Kurth Ranch as punishment: severity of the penalty; serving the purposes of retribution and deterrence; suspension conditioned on commission of a crime and only of persons arrested; and suspension of persons not shown to be presently unfit or unsafe to drive. The suspensions are also not the least restrictive means available to accomplish the State's objectives. Moreover, there is a strong resemblance to the forfeiture provisions at issue in *Austin*, where there was a legislative history that recognized the shortcomings of the criminal justice system to adequately punish and deter drug crimes.

1. Severity of the penalty

Kurth Ranch chose to emphasize the "intrinsically personal" nature of the double jeopardy protection, and gave the "high rate of taxation" significance as one factor that supported the conclusion that the drug tax was punishment. 114 S.Ct. at 1946. Under *Kurth Ranch*, the court must look to the excessiveness of potential penalties under the statute taken as a whole, regardless of whether in individual cases, the penalty might not be that severe. *See, id.* at 1955 (O'Connor, J., dissenting).

The license suspension authorized by the administrative per se law, for example, a one year suspension for a second refusal, is extreme when one considers that a first revocation, the harshest penalty that may be imposed for a conviction of driving while intoxicated under Transp. Art., §§ 16-205 and 16-404 (which usually does not occur before a third or fourth offense) is a maximum of six months. Transp. Art., § 16-208(b). The 120-day suspension without work privileges for a first refusal is incredibly

harsh. Similarly, the 45-day suspension authorized for a first test result more than .10 should be compared with the typical suspension for a first offense conviction. As a result of probation before judgment there is usually no license suspension or revocation for a first offense of driving while intoxicated or under the influence of alcohol.

The license suspension penalty is devastating to many drivers. As the Maryland Court of Appeals recognized in *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986):

> The continued possession of a driver's license may become essential to earning a livelihood; it is, therefore, an entitlement that may not be taken away without the due process mandated by the Fourteenth Amendment. *Sites* [*v. State*], *supra* [300 Md. 702], at 717, 481 A.2d 192 [,199-200 (1984)], *citing Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). *Sites* further makes clear that *revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment.*

Id. at 672, 516 A.2d at 975 (emphasis added).

In Jones' case, he was suspended for 30 days despite a finding that he needed his license for employment purposes and for alcohol education and treatment. The administrative per se license suspension certainly meets *Kurth Ranch*'s first prong.

2. Retribution and deterrence

Jones recognized the retributive and deterrent purposes served by the statute. *Jones*, 340 Md. at 262, 666 A.2d at 141. This conclusion was inescapable given the extensive legislative history, which reflects a frustration with the criminal process in effectively addressing the drunk driving problem, and in the desire for a "swift and sure" penalty. According to the Task Force on Drunk and Drugged Driving:[3]

> It should be emphasized that this proposal establishes an administrative process and penalty that is separate and distinct from any criminal process and penalty. That is, the imposition of the administrative penalty of license suspension is not dependent on a finding of guilt by a court.
>
> It is argued by proponents of an administrative per se offense that the suspension of a driver's license is accomplished more readily through an administrative process than through the already overburdened criminal justice process and, further, that the administrative process generally provides a *sure penalty*. Conviction of an offense in court, it is argued, is never assured, and even if the driver is ultimately convicted, the penalty is subject to a degree of judicial discretion.

---

[3] The Task Force on Drunk and Drugged Driving was established by a joint resolution of the Maryland legislature in 1988. The Task Force's recommendations, contained in a report titled, *General Assembly of Maryland Report of the Task Force on Drunk and Drugged Driving, 1988 Interim*, led to the enactment of the administrative per se law.

> For these reasons, proponents claim that administrative per se is an *effective deterrent to drunk driving because the public perceives that drunk drivers are more likely to suffer a swift and sure penalty* (loss of license) under an administrative per se statute than under a system which ties the penalty only to a criminal conviction.

General Assembly of Maryland Report of the Task Force on Drunk and Drugged Driving, 1988 Interim, (Task Force) at 11-12 (emphasis added).

The Task Force also referred in its study to the availability of federal grant money if the administrative per se legislation were enacted. Task Force at 7. 23 U.S.C. §§ 408 and 410 were promulgated by the Congress in 1982 and 1988, respectively, amongst numerous comments in the Congressional Record reflecting the need to further punish and deter drunk driving. *See, e.g.,* 128 Congressional Record 25966 (1982) (statement of Mr. Howard that "the main aim of the bill is deterrence [and] [p]unishment is justified after the fact"); 128 Cong. Rec. 25968 (1982) (statement of Mr. Young that the federal funds will deter drunk driving by utilizing "swift and sure arrest, conviction, [and] punishment"); 128 Cong. Rec. 25971 (1982) (statement of Mr. Ratchford that states will be encouraged to "punish . . . drunk drivers"). These comments and the comments by proponents in Maryland's legislative history are almost identical to the legislative history relied upon by the Supreme Court in *Austin,* 113 S.Ct. at 2811, to conclude that the forfeitures at issue there served no legitimate remedial purpose. As in *Kurth Ranch,* the deterrent purpose of § 16-205.1 is "beyond question." 114 S.Ct. at 1946.

3. Suspension conditioned on commission of a crime

A characteristic of a statute intended to punish individuals for commission of a crime is that only individuals arrested and charged with the crime are subject to the penalty. *Kurth Ranch*, 114 S.Ct. at 1947. The reasonable grounds to believe that the driver has been driving while intoxicated or under the influence of alcohol requires the detention under § 16-205.1, and generates the administrative proceeding where the suspension is imposed. Reasonable grounds to believe the driver was driving while under the influence of alcohol or while intoxicated is a required finding under § 16-205.1(f)(8). Drunk drivers who are not arrested and charged with driving while intoxicated and under the influence of alcohol are not subject to the license suspension.

The *Jones* court found this element not to be important in the context of license suspension statutes because, unlike the tax in *Kurth Ranch*, license suspensions are traditionally imposed after the commission of crimes. 340 Md. at 255, 666 A.2d at 137. However, under Maryland law, the administrative per se license suspension is the *only* pre-trial driver's license suspension authorized for commission of a crime for a driver who has no impediment on their license, such as a restriction, suspension, or revocation of driving privileges, for whom there is no evidence of a medical affliction relevant to safeness or fitness to drive, or who fails to meet insurance requirements. Additionally, other license suspension statutes require an explicit or implicit finding that the licensee has a character trait which is inconsistent with continued

licensing. *See, e.g.*, Maryland Rule 1230, Rules of Professional Conduct, Rule 8.4(b) (making it unprofessional conduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"). In contrast, the administrative per se driver's license suspension is imposed without a finding that the licensee is unsafe to drive and the license is restored without a finding that the licensee is fit. The *Jones* court thus placed undue emphasis on the traditional nature of license suspensions as remedial in direct contradiction to "*Halper*'s unequivocal statement that labels do not control in a double jeopardy inquiry." *Kurth Ranch*, 114 S.Ct. at 1946.

4. Suspension of persons not shown to be presently unfit or unsafe to drive

The final factor identified by this Court in *Kurth Ranch* was the taxation of confiscated property. 114 S.Ct. at 1948. Here an analogous characteristic of the administrative per se suspension is the license suspension of persons not shown to be presently unfit or unsafe to drive, the suspension's lack of a demonstrated remedial effect.

The State argues that the actual purpose of § 16-205.1 is to physically remove drunk drivers from the roads by taking their licenses. By arguing thus the State concedes that there is no issue of reimbursement of costs, the only form of remedial sanction recognized in *Halper*. As in both *Austin*, 113 S.Ct. at 2812, and *Kurth Ranch*, 114 S.Ct. at 1948, the penalty bears no relation to the State's damages. The State is in effect arguing that the driver's

license is an "instrumentality" of crime. The Supreme Court also rejected that approach in *Austin*, conceding only that the forfeiture of contraband might be characterized as remedial. A driver's license is not contraband.

A simple comparison of the statute before and after 1990, as well as a review of its legislative history, makes it crystalline that the primary class of drivers affected by and intended to be affected by the administrative per se law were first offenders who submit to the test. All others, subsequent offenders ineligible for probation before judgment, persons who refused the test, and known alcohol abusers who began to drink were already, and still are, subject to license suspension and revocation at the Motor Vehicle Administration before, as well as after, conviction. A finding that the administrative per se statute is remedial, when it classifies all offenders subject to suspension, regardless of present unsafeness,[4] is completely contrary to the holdings in *Halper*, *Austin*, and *Kurth Ranch*.

As for subsequent offenders, many, if not most, recidivists get into alcohol treatment programs and attend alcoholics anonymous meetings conscientiously immediately after an arrest which occurs during a "slip"

---

[4] Although the legislative intent appears to be to hold a prompt hearing, *see*, *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 597 A.2d 939 (1991), in practice, as in Jones' case, not only was the suspension hearing months after his arrest, but evidence was presented to show that he was not presently unsafe, that he was attending an alcohol treatment program. Moreover, the ALJ made a finding that Jones needed his license to attend the alcohol program. In refusal cases, and in the case of second offenders who submit to the test, such evidence is irrelevant, because no modification of the suspension is allowed.

from sobriety. Those drivers are sober during the period of suspension, which often, as in this case, takes place a number of months after the arrest. It cannot seriously be argued that the removal of sober drivers from the roads is remedial.

It is more likely any remedial aspect of the statute pertains to the small minority of drivers who either deliberately disregard the law and continue to drink and drive despite an arrest or who are so desperately addicted to alcohol, that no amount of jailing or treatment can keep them sober. Ironically, these individuals, the ones who should be targeted by a truly remedial statute, are the most likely to continue driving despite a license suspension. If the statute in fact serves any remedial purpose for a minority of arrestees, as to the vast majority of offenders the statute is incredibly overbroad.[5] Overbreadth is not being urged here as a theory of defense as the *Jones* court believed. *Jones*, 340 Md. at 255, n.3, 666 A.2d at 138, n.3. Rather, overbreadth here is evidence of a legislative intent to punish.

The statute also fails to employ the least restrictive means to accomplish its objectives. This factor was recognized as a characteristic of punishment in *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) and *Halper*, 490 U.S. at

---

[5] Amicus IIHS concedes this in its brief. "Most alcohol related crashes do not involve repeat offenders. Less than five percent of alcohol-related crashes involve a driver who was arrested for alcohol impaired driving in the *previous* year." IIHS Brief at 5. (Emphasis added). Still, there is *no* evidence of the rate of recidivism the *same* year, the year during which the so-called remedial driver's license suspension takes place.

448-49. Less restrictive means available and used by the State to prevent drunk driving include Guardian Interlock (a driver must submit to a breath test for alcohol with negative results to start his or her car), Alcoholics Anonymous meetings, counseling, home detention, random urinalysis, close supervision and monitoring, and alcohol education and treatment. Screening is routinely done by courts and private organizations to determine if an individual has an alcohol problem which requires immediate attention or intervention. Many offenders are classified as social drinkers and pose no threat to public safety between arrest and trial, if given sufficient education. *See, e.g., Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 567 A.2d 929 (1990) (a single conviction of driving while intoxicated does not make an individual per se unfit or unsafe to drive at the time of the administrative hearing).

The difference between punitive and remedial sanctions is well illustrated by contempt cases. Civil contempt is remedial, because the contemnor may purge the contempt. *State v. Roll*, 267 Md. 714, 728, 298 A.2d 867, 876 (1973). A certain term of incarceration is punishment. *Id.* Unlike civil contempt, not only can the § 16-205.1 suspension not be purged by evidence the driver is currently safe, i.e., conscientiously abstaining from alcohol and attending classes, as to the mandatory penalties required when an individual produces a second test result of more than .10 or refuses the test, such evidence is *irrelevant*. *See, Kurth Ranch*, 114 S.Ct. at 1948 (absence of relation between the penalty and damages).

In Jones' case, the untenability of the State's argument is highlighted. After finding that Jones needed his

license for purposes of alcohol education, the ALJ suspended his license for 30 days, *without* permitting him to drive to treatment, modifying the maximum suspension of 45 days. It is suggested that a sanction that presumptively prevents the driver from receiving needed treatment and education for 30 days and then lets him loose on the roadways is remedial. Moreover, the ALJ, according to the State's theory of a truly remedial sanction, implicitly decided that Jones, some four months after his arrest, would be unsafe for 30 days and that then, magically, would be safe for the next 15 days. The reduction of penalty shows that the ALJ did not consider Jones to be presently unsafe. Rather the 30 days straight suspension was a punishment because Jones' had had previous probations before judgment for drunken driving.

The *Jones* decision is the product of necessity, a desperate attempt to avoid the clear mandate of *Halper*, *Austin*, and *Kurth Ranch*, which blind sided the State and put the current administrative per se scheme, which was conceived prior to those cases, in jeopardy. As one appellate judge has said, the argument that the suspensions are remedial, and not punishment, is a "mantra" that "has to be disregarded if we are to remain honest with our citizens." *State v. Hanson*, 532 N.W.2d 598, 604 (Minn. App. 1995) (Randall, J., concurring) (agreeing that administrative per se license suspension at issue was punishment). *Kurth Ranch* required affirmance of the circuit court below.

B. Halper-Austin

Under *Halper-Austin*, if applicable, the State should have fared no better. Given the abundance of authority supporting the retributive and deterrent purposes of § 16-205.1, the statute's focus, as in *Austin*, on an individual's guilt, 113 S.Ct. at 2808-10, and the failure of the State to use the least restrictive means to accomplish its asserted remedial objectives, the circuit court's legal conclusion under *Halper*'s first prong that the penalty imposed served the purpose of retribution or deterrence, at least in part, is unassailable. Moreover, as to the State's burden under a *Halper-Austin* analysis, as in *Kurth Ranch*, the State has utterly failed to produce any evidence from which the lower court could have concluded that Jones' license suspension, which effectively denied him access to work and alcohol treatment, was at all remedial. As amicus IIHS aptly stated, "[t]he record below is devoid of any shred of evidence on the state's interest in the remedy it seeks or the effect of that remedy." Motion for Reconsideration of Order Limiting Scope of Amicus Brief, 12. Since the civil proceeding *preceded* the criminal proceeding, if the defendant has been punished *to any extent*, the double jeopardy protection would preclude a subsequent prosecution for driving while intoxicated.

In the absence of *any* evidence from the State to show that Jones' suspension was remedial,[6] the circuit court

---

[6] Some courts have referred to a remedial purpose in removing drunk drivers from the roads between arrest and trial. *E.g., Johnson v. State*, 95 Md.App. 561, 570, 622 A.2d 199, 204 (1993). The State has not produced reliable evidence of a high rate of recidivism, or *any* rate of recidivism in drunk driving

could not have been clearly erroneous. *See, Riddick v. State*, 319 Md. 180, 571 A.2d 1239 (1990). The *Jones* court held, in direct contradiction to *Halper* and *Austin*, that "no factual issue is presented for which we must remand or defer to the trial court." 340 Md. at 266, 666 A.2d at 143. If those cases require a two-part analysis, Jones clearly met his burden by demonstrating that the statute served the purposes of punishment, at least in part, a conclusion accepted by the *Jones* court. Under *Halper*, the State then bears the burden of demonstrating its remedial objectives alone justify the ends. The Court of Appeals held that the State was relieved of this responsibility because unlike *Halper*, there were no case specific damages suffered by the government. If the court was correct, then it erred by failing to recognize that under *Halper* and *Austin*, the rational relationship test is the converse of a sanction that serves, in part, the purposes of punishment. *Halper*, 490 U.S. at 449 (equating "no rational relation to the goal of compensating government for its loss" and "appear[ing] to qualify as 'punishment' in the plain meaning of the word"). This Court made that point clear in *Austin*, when it said, " '[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 113 S.Ct. at 2812, *quoting*, *Halper*, 409 U.S. at 448 (emphasis in *Austin*).

---

cases between arrest and trial. In addition, the widely varying, but certain, suspensions of 45 days, 90 days, 120 days and one year bear no relation to the time between arrest and trial.

As in *Austin* and *Kurth Ranch*, and as is more fully argued above, *see*, § I.A.4., the relationship, if any, between the administrative per se suspension and its remedial goals is purely coincidental. Therefore, the only conclusion consistent with *Halper* and *Austin* is that Jones' license suspension was a punishment.

For these reasons, *Jones* directly conflicts with *Halper*, *Austin*, and *Kurth Ranch*.

II. THIS CASE IS WORTHY OF REVIEW BECAUSE THE LOWER COURTS ARE IN COMPLETE CONFUSION AS TO HOW TO APPLY *HALPER*, *AUSTIN*, AND *KURTH RANCH* TO A PRETRIAL DRIVER'S LICENSE SUSPENSION FOR DRUNK DRIVING.

Halper, *Austin*, and *Kurth Ranch*, have generated a wave of litigation in the jurisdictions that have administrative per se laws similar to Maryland's.[7] At the appellate level, post *Kurth Ranch*, the defense has been successful. *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619 (Ohio App. June 27, 1995) (affirming drunk driving dismissal).

---

[7] At the trial court level, the defense has been accepted in at least 24 states. *See, Drunk Driving Defense Okayed By U.S. Court*, Lawyer's Weekly USA, September 25, 1995, at 14. These laws, providing for driver's license suspension of an individual who submits to a breath alcohol test with a result of more than .10, appear to have a common source. 23 U.S.C. §§ 408 and 410 provide for allocation of federal grant money to states that have an administrative per se law meeting certain requirements.

However, other jurisdictions have rejected the defense, post *Kurth Ranch*, for a number of different reasons. *E.g., Snow v. Superior Court*, No. 1CA-SA 95-0102, 1995 WL 332263 (Ariz.App. Jun. 6, 1995); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *Davidson v. Mackinnon*, 656 So.2d 223 (Fla.App. 1995); *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Young*, 530 N.W.2d 269 (Neb.App. 1995).[8] These cases reflect a refusal to recognize that the law regarding double jeopardy has changed significantly in the last six years. However, even the courts rejecting the defense have been unable to agree on the appropriate legal framework or on the proper application of the facts to the chosen framework.

Some courts have concluded that since *Kurth Ranch* was a tax case, that it has no bearing on a driver's license suspension case. *E.g., Snow*. Other reported decisions have concluded that *Kurth Ranch* controls the driver's license suspension situation. *E.g., State v. Ackrouche*, 650 N.E.2d 535 (Ohio Mun. 1995); *Murphy v. Commonwealth*, 896 F.Supp. 577 (D.Va. 1995).

Some reported decisions have relied exclusively on *Halper* and *Austin*. Of those cases, some have equated the rational relationship test with a rational basis type of test. *E.g., Jones*. Some courts have expressly rejected the oft quoted language in *Halper* and *Austin* that any sanction that serves the purposes of punishment in part, is "punishment." *Austin*, 113 S.Ct. at 2812, *quoting, Halper*, 409 U.S. at 448; *e.g. Tench v. Commonwealth*, 462 S.E.2d 922

---

[8] *See also Will Drunk Driving Defense Be Rejected? Experts say: Wait for Federal Courts*, Lawyer's Weekly USA, December 4, 1995, at 1 (surveying appellate decisions).

(Va.App. 1995). Other courts, primarily in federal civil forfeiture cases, have followed *Austin* in the context of double jeopardy. *E.g., United States v. $405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), *amended on denial of reh'g en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345); *United States v. Perez*, No. 94-60788, 1995 WL 689385 (5th Cir., Nov. 21, 1995).

The lower courts have also come to widely differing conclusions about the nature of license suspension. Some of the opinions are obviously flawed. For example, the first Maryland case to address the issue here, which was prior to *Austin* and *Kurth Ranch*, apparently concluded that the effective deterrent aspect of the administrative per se law is remedial. *Johnson*, 95 Md.App. 561, 572, 622 A.2d 199, 205 (1993). It is not. *Halper*, 409 U.S. at 448-49. *Young* and *Higa* also suffer from this very significant defect. Some cases suffer from a stubborn adherence to the traditional nature of license suspensions as remedial. *Savard; Davidson; Higa*. Many courts have concluded that license suspension statutes serve solely remedial purposes. *E.g., Young; Higa; State v. Toyomura*, 904 P.2d 893 (Haw. 1995). Some courts have managed to conclude that administrative per se statutes serve neither remedial nor punitive purposes. *E.g., Ellis v. Pierce*, 282 Cal.Rptr. 93, 95 (Cal.App.1991); *Freeman v. State*, 611 So.2d 1260, 1261 (Fla.App.1992), *cert. denied*, ___ U.S ___, 114 S.Ct. 415 (1993). Some cases, like *Jones*, admit that the administrative per se statute serves punitive purposes, but rely on

the alleged rational relationship between license suspension and highway safety to find that the suspension imposed is not a "punishment." *E.g., Hanson*. Other courts have concluded that an administrative per se law is primarily punitive, and therefore punishment under *Kurth Ranch, e.g., Akrouche,* or that the double jeopardy defense appears meritorious under either *Halper* and *Austin* or *Kurth Ranch*. *Murphy*.

The wide range of views betrays a collective state of confusion in the lower courts regarding the issue presented here. The cases rejecting the defense, although differing in analyses, manage to reach the same desired result, preservation of the status quo. To a large extent, these opinions accept uncritically the state's argument that a rational relationship between license suspensions and public safety exists without a scintilla of evidence of a high rate of recidivism, or even *any* rate of recidivism, between drunken driving arrests and trials. What is clear is that this Court's guidance is needed to clarify the law regarding multiple punishment, and to eliminate the ambiguities created by state courts that appear to be unwilling to follow this Court's decisions in *Halper, Austin,* and *Kurth Ranch*.

CONCLUSION

For the reasons set forth herein, the Petitioner requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

LEONARD R. STAMM*
GOLDSTEIN & STAMM, P.A.
Capital Office Park
6301 Ivy Lane, Suite 504
Greenbelt, MD 20770
301-345-0122

Counsel for Petitioner
*Counsel of Record

January 11, 1996